

IN THE SUPREME COURT OF MICHIGAN

NO. 124213

IN RE PETITION FOR AN ADMINISTRATIVE ORDER

MEMORANDUM OF THE COALITION FOR LITIGATION JUSTICE, INC.,
NATIONAL ASSOCIATION OF MANUFACTURERS,
MICHIGAN MANUFACTURERS ASSOCIATION,
CHAMBER OF COMMERCE OF THE UNITED STATES,
MICHIGAN CHAMBER OF COMMERCE,
MICHIGAN LUMBER AND BUILDING MATERIALS ASSOCIATION,
NATIONAL ASSOCIATION OF WHOLESALE-DISTRIBUTORS,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS LEGAL FOUNDATION,
AMERICAN TORT REFORM ASSOCIATION,
AMERICAN INSURANCE ASSOCIATION,
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AMERICAN CHEMISTRY COUNCIL,
AMERICAN PETROLEUM INSTITUTE,
INTERNATIONAL SAFETY EQUIPMENT ASSOCIATION,
AND WASHINGTON LEGAL FOUNDATION

**IN SUPPORT OF PETITION TO ESTABLISH A COURT RULE OR
ADMINISTRATIVE ORDER CREATING A STATEWIDE
INACTIVE ASBESTOS DOCKETING SYSTEM**

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STATEMENT OF INTEREST

The signatories to this memorandum are many of the leading business and public policy organizations in the nation and in Michigan. As organizations that represent or insure frequent defendants in Michigan asbestos cases, and as public policy organizations, we have a substantial interest in the Petition to Establish a Court Rule or Administrative Order Creating a Statewide

Inactive Asbestos Docketing System now before this Court. We have taken the extraordinary action of joining together on this memorandum because we believe it is critical for this Court to take steps now to: (1) improve the asbestos litigation environment, and (2) help ensure that resources spent in the litigation are directed at those most deserving of compensation – the truly sick. The subject Petition presents this Court with a unique opportunity to do both. For these reasons, we strongly support the subject Petition as a fair and workable solution to Michigan’s asbestos litigation problem.

The Coalition for Litigation Justice, Inc. (“Coalition”) was formed in 2000 as a nonprofit association to address and improve the asbestos litigation environment. Established by insurers, the Coalition’s mission is to encourage fair and prompt compensation to deserving current and future asbestos claimants by seeking to reduce or eliminate the abuses and inequities that exist under the current civil justice system.¹ The Coalition files briefs in important matters, such as this one, that that may have a significant impact on the asbestos litigation environment.

The National Association of Manufacturers (“NAM”) the nation’s largest and oldest multi-industry trade association. The NAM represents more than 12,000 members, including 9,000 small and mid-sized companies, and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states. Headquartered in Washington, D.C., the NAM has 10 additional offices across the country. The NAM’s mission is to enhance the competitiveness of

¹ The Coalition includes the following: ACE-USA companies, Chubb and Son, CNA service mark companies, Fireman’s Fund Insurance Company, The Hartford Financial Services Group, Inc., Argonaut Insurance Co., General Cologne Re, Liberty Mutual Insurance Group, the St. Paul Fire and Marine Insurance Company, and the Great American Insurance Company.

manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the importance of manufacturing to America's economic strength.

The Michigan Manufacturers Association ("MMA") is a business association composed of more than 3,000 private Michigan businesses. An important aspect of MMA's activities is representing the interests of its member-companies in matters of paramount importance before State and federal courts; the United States Congress, the Michigan Legislature, and State agencies. MMA appears before this Court as a representative of private business concerns employing over ninety percent of the industrial work force in Michigan - over one million employees - many of whom are affected by the issues in the petition presently before the Court.

The Chamber of Commerce of the United States ("Chamber") is the world's largest business federation. The Chamber represents an underlying membership of nearly three million businesses and organizations of every size, in every business sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the business community. Accordingly, the Chamber has filed more than 700 *amicus curiae* briefs in federal and state courts. Yet, this matter represents the first time the Chamber has ever participated in support of a Petition proceeding such as this one. The Chamber chose to make this unprecedented filing because of the profound impact this Court's ruling may have on the future course of asbestos litigation in this country. Many of the Chamber's members are defendants in thousands of asbestos cases in federal and state courts across the country. The

Chamber, therefore, is supportive of efforts to promote the sound and fair administration of asbestos claims and improve the asbestos litigation environment.

The Michigan Chamber of Commerce was established in 1959 to be an advocate for Michigan's job providers in the legislative, political and legal process. For more than 40 years, the Michigan Chamber has worked to promote an economic climate that encourages new business investment and champions free enterprise. Today, the Michigan Chamber represents approximately 7,000 employers, trade and professional associations, and local chambers of commerce, making it one of the largest state chambers in the nation. With members of every size and type in all eighty-three Michigan counties, the Chamber represents a broad cross-section of Michigan's economy.

Founded in 1889, the objective of the Lansing-based Michigan Lumber and Building Materials Association ("MLBMA") is to represent and serve the interests of the lumber and building materials industry in Michigan. MLBMA is comprised of over 600 independent retail lumber and building material dealers and suppliers.

The National Association of Wholesaler-Distributors ("NAW") is the national voice of the wholesale distribution industry. NAW's membership represents over 100 national line-of-trade associations, 50 regional, state and local wholesale distribution associations, and approximately 40,000 wholesale distribution companies.

The National Federation of Independent Business Legal Foundation ("NFIB Legal Foundation"), a nonprofit, public interest law firm established to protect the rights of America's small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 600,000 members

of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores. The NFIB Legal Foundation is concerned about reports from small-business owners that lawyers are expanding the web of defendants in asbestos lawsuits to include many small businesses. The NFIB Legal Foundation believes that solutions like the one proposed in the Petition supported by this memorandum are needed to ensure that asbestos claims are resolved fairly and efficiently, without crippling America's businesses or depriving truly sick patients of compensation that they need and deserve.

The American Tort Reform Association ("ATRA"), founded in 1986, is a broad-based bipartisan coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

Founded in 1866 as the National Board of Fire Underwriters, the American Insurance Association ("AIA") is a national trade association representing more than 400 companies writing property and casualty insurance in every state and jurisdiction of the United States. The purposes of AIA are to promote the economic, legislative, and public standing of its members; to provide a forum for discussion of policy problems of common concern to its members and the insurance industry; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities including the promotion of safety and security of persons and property. AIA is headquartered in Washington, D.C., maintains seven regional offices, and retains legislative counsel in every state.

The Alliance of American Insurers ("AAI") is a voluntary, non-profit trade association representing the interests of more than 325 property-casualty insurance companies throughout the

United States. The AAI's membership represents a cross-section of the insurance industry and is composed of insurers of all sizes. In 2001, AAI members, across all lines, wrote approximately \$1.2 billion in direct premiums in Michigan. AAI members therefore account for over nine percent of all property-casualty insurance written in the state.

The National Association of Independent Insurers ("NAII") is a nonprofit property and casualty trade association, representing more than 725 member companies. The mission of NAII is to influence public policy to foster a competitive insurance marketplace, promote the successful operation of NAII members and enhance the welfare of their customers. Member companies account for 31.2 percent of the industry's total premium volume. As a group, NAII members write every line of insurance for a combined total of \$112 billion in annual premiums. Companies range in size from billion-dollar national corporations to multi-line regional groups to single-state and niche writers. A primary purpose of NAII is to provide objective data and expertise to regulators, legislators, and agencies of the state and federal branches.

Founded in 1904, the Motor & Equipment Manufacturers Association ("MEMA") exclusively represents and serves manufacturers of motor vehicle components, tools and equipment, automotive chemicals and related products used in the production, repair and maintenance of all classes of motor vehicles. MEMA's three market segment associations serve all of the motor vehicle supplier industry: aftermarket – Automotive Aftermarket Suppliers Association (AASA); heavy duty – Heavy Duty Manufacturers Association (HDMA); and original equipment – Original Equipment Suppliers Association (OESA).

The American Chemistry Council ("Council") represents the leading companies engaged in the business of chemistry. Council members apply the science of chemistry to make innovative

products and services that make people's lives better, healthier and safer. The Council is committed to improved environmental, health and safety performance through Responsible Care®, common sense advocacy designed to address major public policy issues, and health and environmental research and product testing. The business of chemistry is a \$460 billion enterprise and a key element of the nation's economy. It is the nation's largest exporter, accounting for ten cents out of every dollar in U.S. exports. Chemistry companies invest more in research and development than any other business sector.

The American Petroleum Institute ("API") is a nationwide, not-for-profit trade association representing over 400 companies engaged in all aspects of the oil and gas industry, including exploration, production, refining, transportation and marketing. API frequently represents its members in judicial matters affecting the United States oil and gas industry.

The International Safety Equipment Association ("ISEA"), is the trade association in the United States for companies that manufacture safety equipment. ISEA's member companies are world leaders in the design and manufacture of clothing and equipment used in factories, construction sites, hospitals and clinics, farms, schools, laboratories, and in the home. Included in the association are makers of products for head, eye and face, respiratory, hearing, hand and fall protection; environmental monitoring instruments; safety warning signs and symbols; emergency eyewash and shower; first aid kits, clean room garments and safety wearing apparel. ISEA member companies are united in the common goal of protecting the health and safety of people exposed to hazardous and potentially harmful environments.

The Washington Legal Foundation ("WLF") is a national, nonprofit public interest law and policy center based in Washington, D.C. Founded in 1977, WLF devotes substantial resources to

advocating civil justice reform in federal and state courts concerning issues such as punitive damages, class action certification, the misuse of scientific evidence (“junk science”), and novel theories of tort liability. Of particular relevance to the issue that is the subject of the instant Petition, WLF has participated as *amicus curiae* in asbestos-related cases that raise liability issues. WLF has also published asbestos-related policy studies through its Legal Studies Division.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1997, the U.S. Supreme Court stated that this country is in the midst of an “asbestos-litigation crisis.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Since then, the litigation has spread like a renewed wild fire, taking on even greater proportions. Claims continue to pour in at an extraordinary rate, scores of employers have been forced into bankruptcy, and payments to the sick are threatened. See Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).

Present trends in asbestos litigation have set off a chain reaction. Payments to individuals with little or no serious physical illness have encouraged more lawsuits. Recent reports indicate that as much as ninety percent of new asbestos-related claims are filed by the non-sick. These filings have forced dozens of so-called “traditional” asbestos defendants into bankruptcy.

These bankruptcies, in turn, have created ripple effects throughout the entire business community. When “traditional” defendants are forced into bankruptcy, experience shows that the asbestos personal injury bar will cast its litigation net wider and sue more defendants. Now, more than 8,400 defendants have been named in asbestos cases. Many are either household names and small businesses. These defendants have only very attenuated connections to asbestos, but they provide fresh “deep pockets,” and that is why they have become targets of litigation.

Some of the new attenuated class of defendants, the so-called “peripheral defendants,” have themselves begun to collapse under the great weight of claims against them. The downward spiral will continue to play out on a broad scale for many more years unless something is done.

The current asbestos litigation system is not working for anyone. Clearly, changes are needed, but federal legislation to solve the problem remains speculative. Therefore, many courts are now reevaluating the way they handle asbestos claims and working to make improvements. *See* Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

In particular, a growing number of jurisdictions have chosen to implement an inactive asbestos docket (also called a pleural registry or deferred docket) or a similar docket management plan. *See* Susan Warren, *Swamped Courts Practice Plaintiff Triage*, Wall St. J., Jan. 27, 2003, at B1, *available at* 2003 WL-WSJ 3957498. Individuals who cannot meet certain objective medical criteria are placed on an inactive docket with statute of limitations being tolled, and all discovery stayed. Claimants are moved to the active civil docket when they present credible medical evidence of impairment. *See* Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 Harv. J.L. & Pub. Pol’y 541 (1992) [hereinafter Schuck]. These plans have existed for many years in some jurisdictions. They have proven to be fair and workable. *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 Tex. Tech. L. Rev. 1 (2001) [hereinafter Behrens & Parham].

The subject Petition, filed on behalf of approximately sixty asbestos defendants, presents this Court with a unique opportunity to adopt a statewide inactive asbestos docket. The Court should seize this opportunity. *See The Fairness in Asbestos Compensation Act of 1999: Hearing on S. 758*

Before the Subcomm. On Admin. Oversight and the Courts of the Senate Comm. on the Judiciary, 106th Cong. 2 (Oct. 5, 1999) (statement of the Hon. Conrad L. Mallett, Jr., former Chief Justice, Michigan Supreme Court) (stating that “During my tenure on my state’s highest court I was keenly aware of my responsibility to be sure the court system functioned efficiently. . . .”). As Senior Judge Joseph F. Weis, Jr. of the U.S. Court of Appeals for the Third Circuit has stated:

It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants. . . . [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.

Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993).

ARGUMENT

I. ASBESTOS LITIGATION IS A CRISIS THAT MUST BE ADDRESSED

When asbestos product liability lawsuits emerged almost thirty years ago, nobody could have predicted that courts today would be facing an ever growing “asbestos-litigation crisis.” *Amchem*, 521 U.S. at 597. Many believed that asbestos litigation would be a serious but diminishing problem in the years to come.

Instead of declining, however, “the crisis is worsening at a much more rapid pace than even the most pessimistic projections.” Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts’ Duty to Help Solve The Asbestos Litigation Crisis*, Briefly, Vol. 6, No. 6, June 2002, at 2 (Nat’l Legal Center for the Pub. Interest monograph), *available at*

<<http://www.nlcpi.org>> (last visited Aug. 14, 2003) [hereinafter Bell]. The number of asbestos cases pending nationwide doubled from 100,000 to more than 200,000 during the 1990s. *See The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 106th Cong. 4 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School). 90,000 new cases were filed in 2001 alone. *See* Alex Berenson, *A Surge in Asbestos Suits, Many by Healthy Plaintiffs*, N.Y. Times, Apr. 10, 2002, at A1, *abstract available at* 2002 WL 18538000.

The RAND Institute for Civil Justice predicts that the litigation will worsen, and that the number of claims yet to be filed could range from one to three million. *See* Stephen Carroll et al., *Asbestos Litigation Costs and Compensation: An Interim Report 77* (RAND Inst. for Civil Justice, Sept. 2002) [hereinafter RAND Rep.]; *see also* Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991), *reprinted in* Vol. 6, No. 4, Mealey's Litig. Rep.: Asbestos (Mar. 15, 1991) (estimating that the number of future asbestos claimants could reach 3.5 million).

A. Mass Filings By The Non-Sick Threaten Payments to the Truly Sick

In the past, most asbestos claims were filed by “workers suffering from grave and crippling maladies. The most common was mesothelioma.” Roger Parloff, *The \$200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff and Extracting Billions for Themselves*, *Fortune*, Mar. 4, 2002, at 158, *available at* 2002 WL 2190334 [hereinafter Parloff]. Today, however, the vast majority of new asbestos claimants are “people who have been exposed to asbestos, and who (usually) have some marker of exposure such as changes in the pleural membrane covering the lungs, but who are not impaired by

an asbestos-related disease and likely never will be.” *The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong. at 5 (July 1, 1999) (statement of Christopher Edley, Jr., Professor, Harvard Law School). *See also In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (“In virtually all pleural plaque and pleural thickening cases, plaintiffs continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring.”).

Recent estimates indicate that up to ninety percent of new claims are filed by plaintiffs with little or no impairment. *See* RAND Rep., *supra*, at 20; Jennifer Biggs et al., *Overview of Asbestos Issues and Trends* 1 (Dec. 2001), available at <<http://www.actuary.org/mono.htm>> (last visited Aug. 14, 2003) [hereinafter Biggs].²

A primary reason that so many unimpaired individuals are filing claims is the “fear that their claims might be barred by the statute of limitations if they wait until such time, if ever, that their asbestos-related condition progresses to disability.” *In re Asbestos Cases*, 586 N.E.2d 521, 523 (Ill. App. 1991). *See also The Fairness in Asbestos Compensation Act of 1999: Hearing on H.R. 1283 Before the House Comm. on the Judiciary*, 1999 Leg., 106th Cong. 4 (July 1, 1999) (statement of Dr. Louis Sullivan, former Secretary of the U.S. Department of Health and Human Services), available at 1999 WL 20009757 (stating that there are “mass filings of cases on behalf of large groups of people who are not sick and may never become sick but who are compelled to file for remedial compensation simply because of state statutes of limitation.”).

² *See also* James A. Henderson, Jr. & Aaron D. Twerski, *Asbestos Litigation Gone Mad: Exposure-based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. Rev. 815 (2002).

Another reason may be that plaintiffs' lawyers are aware that many traditional asbestos defendants are going bankrupt, and may seek compensation now out of fear that it will not be available later. Some plaintiffs' lawyers also may be aware of huge awards being given to some unimpaired plaintiffs, and may question "Why wait for an injury to manifest itself if I can receive compensation for my clients now?"

In addition, the increase in filings by unimpaired claims may result from mass screenings conducted by plaintiffs' law firms and their agents.³ Such screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos.⁴ Regardless of whether one agrees with this practice, there seems to be a consensus that it fuels new asbestos filings.⁵ As the manager of the federal asbestos docket, Senior U.S. District Judge Charles Weiner of the Eastern District of Pennsylvania, has noted: "Oftentimes, these suits

³ See Parloff, *supra*, at 154 ("To unearth new clients for lawyers, screening firms advertise in towns with many aging industrial workers or park X-ray vans near union halls. To get a free X-ray, workers must often sign forms giving law firms 40 percent of any recovery. One solicitation reads: 'Find out if YOU have MILLION DOLLAR LUNGS!'").

⁴ See *Eagle-Picher Indus., Inc. v. Am. Employers' Ins. Co.*, 718 F. Supp. 1053, 1057 (D. Mass. 1989) ("[M]any of these cases result from mass X-ray screenings at occupational locations conducted by unions and/or plaintiffs' attorneys, and many claimants are functionally asymptomatic when suit is filed."); *In re Joint E. & S. Dists. Asbestos Litig.*, 237 F. Supp. 2d 297, 309 (E. & S.D.N.Y. 2002) ("Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screening programs targeting possibly asbestos-exposed workers and attraction of potential claimants through the mass media.").

⁵ See Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in The Brave New World of Aggregative Litigation*, 26 Wm. & Mary Envtl. L. & Pol'y Rev. 243, 273 (2001) (providing detailed account of how the typical "exposure only" case arises and is litigated; stating that "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by unimpaired).

are brought on behalf of individuals who are asymptomatic as to an asbestos-related illness and may not suffer in the future. Filing fees are paid, service costs incurred, and defense files are opened and processed. Substantial transaction costs are expended and therefore unavailable for compensation to truly ascertained asbestos victims.” *In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Admin. Order No. 8, at 1-2 (E.D. Pa. Jan. 14, 2002) [hereinafter MDL 875, Admin. Order No. 8].

The problem presented by these claims is self-evident: they create judicial backlogs and exhaust scarce resources that should go to “the sick and the dying, their widows and survivors.” *In re Collins*, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom. Collins v. Mac-Millan Bloedel, Inc.*, 532 U.S. 1066 (2001) (internal citation omitted). *See also Larson v. Johns-Manville Sales Corp.*, 399 N.W.2d 1, 23 (Mich. 1986) (“We believe that discouraging suits for relatively minor consequences of asbestos exposure will lead to a fairer allocation of resources to those victims who develop cancers.”); Steven Hantler, *Judges Must Play Key Role in Stemming Tide of Asbestos Litigation*, *Andrews Asbestos Litig. Rptr.*, Vol. 25, No. 14, May 22, 2003, at 12 (assistant general counsel for DaimlerChrysler Corp., stating: “The tragedy is that as plaintiffs’ lawyers enroll the healthy into their lawsuits in order to line their own pockets, less money is available for those who are actually sick and dying.”).⁶

⁶ Judge Weiner has explained that “[o]nly a very small percentage of the cases filed have serious asbestos-related afflictions,” but they “are prone to be lost in the shuffle with pleural and other non-malignant cases.” *In re Asbestos Prods. Liab. Litig. (No. VI)*, 1996 WL 539589, *1 (E. D. Pa. Sept. 12, 1996); *see also id.* at *3 n.8 (“Pleural disease is most often an asymptomatic scarring of the pleura—a tissue thin membrane surrounding the lung It can only be discovered through x-ray and, in and of itself, does not pose a health risk or impairment.”).

Indeed, lawyers who represent cancer victims have expressed strong concern that filings by the unimpaired are threatening payments to their clients. For example, Oakland, California, attorney Steve Kazan has testified that recoveries by the unimpaired may result in his clients being left uncompensated. *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise); *see also* Pamela Sherrid, *Looking for Some Million Dollar Lungs*, U.S. News & World Rep., Dec. 17, 2001, at 36, *available at* 2001 WL 30366341 (quoting Mr. Kazan).

In addition, Dallas, Texas, lawyer Peter Kraus, who represents asbestos cancer victims, has said that plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired." Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, Wall St. J., Apr. 25, 2001, at A1, *available at* 2002 WL-WSJ 3392934. Plaintiffs' lawyer Matthew Bergman of Seattle, Washington, has written: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system. As a result of these bankruptcies, the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims." Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, Seattle Post-Intelligencer, May 30, 2002, at B7, *available at* 2002 WL-STLPI 5934774 [hereinafter Bergman].

Even renowned Mississippi plaintiffs' lawyer Richard Scruggs has said, "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy." *'Medical Monitoring and Asbestos Litigation' — A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 Mealey's Litig. Rep.: Asbestos 39 (Mar. 1, 2002) (quoting Mr. Scruggs) [hereinafter Schwartz & Scruggs].

Cancer victims have a well-founded fear that they not receive adequate or timely compensation unless trends in the litigation are addressed.⁷ For example, consider Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company's bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990, and did not resume again until 1995. According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever." Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, Wall St. J., Dec. 14, 2001, at B6, available at 2001 WL-WSJ 29680683. As a result, the Trust is now paying out just *five cents on the dollar* to asbestos claimants. *See id.*

Consider also the widow of one man in Washington State who died from mesothelioma. She has been told that she should expect to receive only fifteen percent of the \$1 million she might have received if her husband had filed suit before the companies he sued went bankrupt. *See* Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, Wash. Post., Sept. 25, 2002, at E1, available at 2002 WL 100084407. Similarly, the widow of a mechanic in Ohio will recover at most \$150,000 of the \$4.4 million dollar award that she received for her husband's death. *See* Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, Cleveland Plain Dealer, Nov. 5, 2002, at A1, available at 2002 WL 6382801.

⁷ *See In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 751 (E. & S.D.N.Y. 1991) ("Overhanging this massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of insolvency--as in the case of some dozen manufacturers already in bankruptcy."), *vacated*, 982 F.2d 721 (2d Cir. 1992).

It is for these reasons that lawyers representing sick and dying plaintiffs have endorsed inactive docket type solutions to the litigation. *See, e.g.,* Bergman, *supra* (“The solution is simple: defer the non-sick claims unless and until the claimants actually suffer an asbestos-related disease.”); Paul Hampel & Philip Dine, *Asbestos Litigation Deal Could Force Law Offices to Find New Specialties; Bill Would Substitute Trust Fund for Lawsuits*, St. Louis Post-Dispatch, July 23, 2003, at A1, *available at* 2003 WL 3596458 (quoting Randy Bono, a prominent Madison County, Illinois, asbestos plaintiffs' attorney as saying, “I welcome change. Getting people who aren't sick out of the system, that's a good idea.”).

B. Bankruptcies Are Placing A Heavy Toll on Workers And Their Employers

Asbestos litigation has already forced nearly seventy companies into bankruptcy. *See* Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, Mealey's Litig. Rep.: Asbestos, Vol. 18, No. 3, Mar. 7, 2003, at 1. Many of the bankruptcies have occurred within the past two years. The “process is accelerating,” *In re Collins*, 233 F.3d at 812, due to the “piling on” nature of asbestos liabilities. *See* Mark D. Plevin & Paul W. Kalish, *What's Behind the Recent Wave of Asbestos Bankruptcies?*, Vol. 16, No. 6, Mealey's Litig. Rep.: Asbestos (Apr. 20, 2001). Each time a defendant declares bankruptcy, “mounting and cumulative” financial pressure is placed on the “remaining defendants, whose resources are limited.” Christopher Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 Harv. J. on Legis. 383, 392 (1993).

As the Enron debacle illustrated, these bankruptcies represent more than the demise of a business. They also have real impacts on the job prospects of employees, the retirement savings of

ordinary citizens, and the economy as a whole.⁸ For instance, a 2002 study by Nobel Prize-winning economist Joseph Stiglitz and two colleagues on the direct impact of asbestos bankruptcies on workers found that bankruptcies resulting from asbestos litigation put approximately 52,000 to 60,000 people (many of them union workers) out of work between 1997 and 2000. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* 12 J. Bankr. L. & Prac. 51, 73-74 (2003). Those workers and their families lost \$175 million to \$200 million in wages. *See id.* at 76. Employee retirement assets declined roughly twenty-five percent. *See id.* at 83. In addition to the impact on workers, the aggregate direct costs of bankruptcies on the bankrupt firms, such as the legal, accounting, and other expenses associated with a bankruptcy, are estimated at between \$325-\$625 million. *See id.* at 86.

Asbestos-related bankruptcies result in indirect costs as well. *See* Patrick J. Hagan et al., *Totalling Up the Costs of Asbestos Litigation: Guess Who Will Pay the Price?*, 9 Temp. Envtl. L. & Tech. J. 1 (1990). A 2002 study by National Economic Research Associates found that workers, communities, and taxpayers will bear as much as \$2 billion in additional costs, due to indirect and induced impacts of company closings related to asbestos. *See* Jesse David, *The Secondary Impacts*

⁸ *See The State of the Economy: Hearing Before the Sen. Comm. on the Budget*, 107th Cong. (Jan. 29, 2003) (statement of Michael Baroody, Executive Vice President of the National Association of Manufacturers); Lisa Girion, *Firms Hit Hard as Asbestos Claims Rise*, L.A. Times, Dec. 17, 2001, at A1, available at 2001 WL 28937452; Amity Shlaes, *The Real-Life Tragedy of the Asbestos Theatre*, Fin. Times, May 14, 2002, at 15, available at 2002 WL 20299748; Eric Roston, *The Asbestos Pit*, Time, Mar. 11, 2002, Y9, available at 2002 WL 8385920; Michael Freedman, *The Tort Mess*, Forbes, May 13, 2002, at 95, available at 2002 WL 2214449; Quenna Sook Kim, *Firms Hit by Asbestos Litigation Take Bankruptcy Route*, Wall St. J., Dec. 21, 2000, at B4, available at 2000 WL-WSJ 26620724.

of *Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003).⁹ For instance, for every ten jobs lost directly, the community may lose eight additional jobs. *See id.* at 8. The shutting of plants and job cuts will decrease per capita income, lead to declining real estate values, and lower federal, state and local tax receipts. *See id.* at 11-13. Additional costs brought upon workers and communities include up to \$76 million in worker retraining, \$30 million in increased healthcare costs and \$80 million in payment of unemployment benefits. *See id.* at 14-15.

There is also a staggering loss to the U.S. economy. The RAND Institute for Civil Justice recently estimated that \$70 billion has already been spent in asbestos litigation through year-end 2002. *See* S. Rep. 108-118, at 59 (2003) (citing RAND's Stephen Carroll). A lot of that money has been spent in transaction costs that could be put to more productive uses, such as job creation and innovation.¹⁰ The remaining future cost of the litigation is an estimated \$130 billion. *See Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary*, 107th Cong. (June 4, 2003) (statement of Jennifer L. Biggs, Consulting Actuary, Tillinghast-Towers Perrin).

⁹ *See also Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary*, 107th Cong. (June 4, 2003) (statement of Frederick C. Dunbar, Ph.D., Senior Vice President, Nat'l Econ. Research Assocs.).

¹⁰ Goldman Sachs Managing Director Scott Kapnick has also explained that "the large uncertainty surrounding asbestos liabilities has impeded transactions that, if completed, would have benefited companies, their shareholders and employees, and the economy as a whole." *Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary*, 107th Cong. (June 4, 2003) (statement of Scott Kapnick Managing Director, Goldman Sachs).

To put the total past and future cost of asbestos litigation in perspective, consider that analysts estimate the cost of rebuilding Iraq, a country battered by two wars in two decades and twelve years of United Nations sanctions, at roughly the same amount.¹¹ Asbestos litigation costs are at least ten times greater than the \$20 billion in property damage caused by the massive 6.7 magnitude earthquake that hit Los Angeles in 1994.¹² The litigation will also cause far more economic devastation than Hurricane Andrew, which pounded Florida and Louisiana in 1992 to become one of the most expensive natural disasters in U.S. history, with a cost of about \$30 billion.¹³ As former U.S. Attorney General Griffin Bell has pointed out, asbestos litigation costs will exceed the cost of “all Superfund sites combined, Hurricane Andrew, or the September 11th terrorist attacks.” Bell, *supra*, at 4.

C. Peripheral Defendants Are Being Dragged Into the Litigation

Now that virtually all former manufacturers of asbestos-containing products have been forced into bankruptcy, “the net has spread from the asbestos makers to companies far removed from the scene of any putative wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14, *available at* 2001 WL-WSJ 2859560.¹⁴ Plaintiffs’ attorney Scruggs has remarked that

¹¹ See Jonathan Weisman & Mike Allen, *Officials Argue for Fast U.S. Exit From Iraq*, Wash. Post, Apr. 21, 2003, at A1, *available at* 2003 WL 18819230 (reporting that at Yale University economist William D. Nordhaus has estimated the total postwar cost of rebuilding Iraq at between \$75 billion and \$500 billion).

¹² See William Booth, *Unsettling Forecast For the Bay Area; Chance of Big Quake Before 2030 Put at 70%*, Wash. Post, Oct. 15, 1999, at A3, *available at* 1999 WL 23309261.

¹³ See Mike McClintock, *Preparing for High Winds*, Wash. Post, May 13, 1999, at T23, *available at* 1999 WL 17002587.

¹⁴ See also Steven Hantler, *Toward Greater Judicial Leadership in Asbestos Litigation*, Manhattan Inst. Civil Justice Forum, No. 41, Apr. 2003, at 6, *available at* <<http://www.manhattaninstitute.org>> (last visited Aug. 14, 2003); Editorial, *The Job-Eating Asbestos Blob*, Wall St. J., Jan. 23, 2002, at A22, *available at* 2002 WL-WSJ 3383766.

the litigation has turned into the “endless search for a solvent bystander.” Schwartz & Scruggs, *supra*, at 5 (quoting Mr. Scruggs).

As a result, “[a] newer generation of peripheral defendants are becoming ensnarled in the litigation.” *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710, 747-48 (E. & S.D.N.Y. 1991), *vacated*, 982 F.2d 721 (2d Cir. 1992). Many of these defendants never made or used asbestos in their products. They have only an attenuated connection to the litigation. See Richard B. Schmitt, *Burning Issue: How Plaintiffs’ Lawyers Have Turned Asbestos Into a Court Perennial*, Wall St. J., Mar. 5, 2001, at A1, *available at* 2001 WL-WSJ 2856111. See also Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 Miss. L.J. 531 (2001); Victor E. Schwartz & Leah Lorber, *A Letter to the Nation’s Trial Judges: How the Focus on Efficiency is Hurting You and Innocent Victims in Asbestos Liability Cases*, 24 Am. J. Trial Advoc. 247 (2000).

There are now more than 8,400 asbestos defendants, see Susan Warren, *Plaintiffs Target Companies Whose Premises Contained Any Form of Deadly Material*, Wall St. J., Jan. 27, 2003, at B1, *available at* 2003 WL-WSJ 3957497, up from only 300 in 1982. See RAND Rep., *supra*, at 6. Many of these defendants are household names; many others are small businesses facing potentially devastating liability. See Susan Warren, *Asbestos Suits Target Makers of Wine, Cars, Soups, Soaps*, Wall St. J., Apr. 12, 2000, at B1, *available at* 2000 WL-WSJ 3025073. Attorney General Bell speculates that half of the companies in the Dow Jones Index may soon be affected. See Bell, *supra*, at 24. See also RAND Rep., *supra*, at 50 (finding that asbestos litigation “has spread to touch firms in industries engaged in almost every form of economic activity that takes place in the American economy.”). According to Senior U.S. District Court Judge Jack Weinstein, “[i]f the acceleration

and expansion of asbestos lawsuits continues unaddressed, it is not impossible that every company with even a remote connection to asbestos may be driven into bankruptcy.” Remarks of the Hon. Jack Weinstein, at a symposium held at the Bar Association of the City of New York, *Asbestos: What Went Wrong?*, Oct. 21, 2002, at 12.

II. THE ASBESTOS LITIGATION PROBLEMS IN MICHIGAN ARE REPRESENTATIVE OF THE NATIONAL ASBESTOS CRISIS

As documented with crystal clarity in the subject Petition, the asbestos litigation trends in Michigan reflect those occurring elsewhere in this country. Those facts do not need to be repeated here, but some highlights are deserving of mention.

A. Asbestos Filings in Michigan Have Risen Dramatically

Like other states, Michigan has witnessed a dramatic increase in asbestos filings. For example, the number of number of pending cases in Wayne County jumped from “550 in 1999 to approximately 1500 at the end of 2002.” Pet. at 2, 18. The “vast, vast majority” of these claimants have little or no physical impairment. *Id.* at 2.

B. Michigan Employers Have Begun to Declare Bankruptcy; New Peripheral Defendants Are Being Targeted

Moreover, some of the largest employers in Michigan are falling victim to the new wave of asbestos litigation. *See, e.g.,* Mark Truby, *Asbestos Suits Haunt Carmakers*, Detroit News, Mar. 31, 2002, at A1, *abstract available* at 2002 WL 18054077. As a result, the Michigan workers and retirees who rely on those companies for their livelihood and retirement security are losing their jobs and their savings.

Most notably, Southfield-based Federal Mogul, which employed 52,000 workers, became a victim of the “solvent by-stander” approach when it was forced to seek the protection of the

bankruptcy courts after acquiring a British auto parts company that previously had a narrow connection with asbestos liability. See Tom Walsh, *More Firms Tangled in Ties To Asbestos*, Detroit Free Press, Jan. 24, 2003, *abstract available at* 2002 WL 6702978. Federal Mogul's asbestos claims went from \$89 million in 1998 to \$351 million in 2000, "with no end in sight." *Id.* The company's shares fell from \$65 per share in 1998 to 45 cents per share in October 2001. See Jamie Butters, *Asbestos Suits Bankrupt Another: Federal-Mogul; Auto Supplier Says It Won't Cut Jobs, Shut Plants*, Detroit Free Press, Oct. 2, 2001, *abstract available at* 2001 WL 28650223. "[S]ome of the biggest corporations in Michigan are worried they could be next." Rick Haglund, *Asbestos Threat Hangs Over Business*, Grand Rapids Press, Dec. 4, 2002, *abstract available at* 2002 WL 101252344.

In addition, "[t]he big business of asbestos litigation is encroaching upon the livelihood of Michigan's small businesses," which typically includes "a staggering number of hardware stores, construction-related businesses, car repair shops, not to mention plumbers and various other trades." Karen Kerrigan, Editorial, *Asbestos Suits Imperil Small Michigan Firms*, Detroit Free Press, Nov. 3, 2002, *abstract available at* 2002 WL 102335572.

The toll of the litigation on Michigan defendants led one local newspaper to editorialize: "Those who are genuinely ill should be given compensation. But to drive healthy companies into bankruptcy, including some of Metro Detroit's major employers, serves no one, except a small number of aggressive litigators." *Don't Let Asbestos Cases Bankrupt Automakers*, Detroit Free Press, Mar. 31, 2003, *abstract available at* 2002 WL 18054074.

Former Detroit Mayor Dennis Archer, who now heads the American Bar Association and was once a trial lawyer himself, has cited his first-hand knowledge of the devastation asbestos

litigation has caused within Michigan as a leading reason he has become one of the leading voices calling for “medical standards to differentiate between people who are seriously sick and those who are not.” Tom Walsh, *Archer Fights Exploitative Asbestos Suits*, Detroit Free Press, Feb. 13, 2003, *abstract available at* 2003 WL 2542565.

**III. A STATEWIDE INACTIVE DOCKET WOULD PROVIDE
AN EFFECTIVE AND APPROPRIATE SOLUTION
TO THE ASBESTOS LITIGATION PROBLEMS IN MICHIGAN**

A. The Court Should Adopt A Statewide Asbestos Docketing System

This Court has the unique opportunity to address Michigan’s asbestos problems and join other pioneering courts by implementing a statewide inactive asbestos docket. A statewide inactive docketing system would address a significant legal crisis in a surgical fashion, narrowly tailored to deal with the problem of the unimpaired claimants and the “ripple effects” such claims produce. *See* Richard O. Faulk, *Asbestos Litigation in State Court: Why the System is Broken and Some Suggestions for Repair*, Prod. Safety & Liab. Rptr. (BNA), Vol. 30, No. 37, at 845, Sept. 23, 2002, *also printed in* Class Action Litig. (BNA), Vol. 3, No. 19, Oct. 11, 2002, at 658.¹⁵

Importantly, an inactive docket would greatly benefit the truly sick as well as asbestos defendants. It would give trial priority to the sick by allowing them to move “to the front of the

¹⁵ For a helpful primer on the basic medical issues involved in utilizing objective medical criteria to prioritize the treatment of asbestos claims, see Dr. John E. Parker, *Understanding Asbestos-Related Medical Criteria*, Vol. 18, No. 10, Mealey’s Litig. Rep.: Asbestos, June 18, 2003, at 45. *See also* *Solving the Asbestos Litigation Crisis: Hearing on S. 1125, the Fairness in Asbestos Injury Act of 2003, Before the Sen. Comm. on the Judiciary, 107th Cong. (June 4, 2003)* (statements of Dr. John E. Parker, Professor and Chief of Pulmonary and Critical Care Medicine, Robert C. Byrd Health Sciences Center of West Virginia University and Dr. James D. Crapo, Professor of Medicine at the National Jewish Center and University of Colorado Health Sciences Center, former President of the American Thoracic Society, and President-elect of the Fleischner Society).

line” and not be forced to wait until earlier-filed claims by unimpaired individuals are resolved. Removing these delays can be especially important to impaired claimants, particularly if the individual has a fatal disease, such as mesothelioma, or is an older person, which is frequently the case. An inactive docket also would help unimpaired individuals by protecting their claims from being time-barred should an asbestos-related disease later develop. This would address a primary engine driving the filing of many claims by unimpaired claimants. In addition, an inactive docket would conserve scarce financial resources needed to compensate sick claimants –resources now used up litigating “claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be).” Schuck, *supra*, at 555. Finally, adoption of an inactive docket would reduce the specter of more employers being driven into bankruptcy, thereby helping to ensure that adequate resources remain for impaired claimants in the future. *See Behrens & Parham, supra*.

B. Inactive Dockets Are Sound and Proven

In the late 1980s and early 1990s, three major jurisdictions adopted inactive docket plans – Boston, Chicago and Baltimore. Judges from all three courts have stated that they believe the plans are working well for all parties. *See Inactive Asbestos Dockets: Are They Easing the Flow of Litigation?*, HarrisMartin’s Columns: Asbestos, Feb. 2002, at 2 [hereinafter Columns: Asbestos]. *See also In re USG Corp.*, No. 01-2094, Mem. Op. and Order, at 8 n.3 (Bankr. Del. Feb. 19, 2003) (“The practical benefits of dealing with the sickest claimants first have been apparent to the courts for many years and have led to the adoption of deferred claims registries in many jurisdictions.”).

1. **Boston, Massachusetts**

Judge Hiller Zobel adopted the Massachusetts Inactive Asbestos Docket in 1986 as part of his order creating a statewide consolidated asbestos docket. *See Mass. State Ct. Asbestos Pers. Injury Litig.*, Order (Commw. of Mass., Middlesex Super. Ct., Sept. 1986). The docket was envisioned as a mechanism to give priority to the claims of the truly sick while tolling statutes of limitations for claims brought by the non-sick or their families. While on the inactive docket, cases are exempt from discovery.

The Massachusetts Inactive Docket does not specify criteria to be applied in determining whether a case should be moved from the Inactive to the Active Docket. Over the past fifteen years, however, the judge tasked with overseeing the Inactive Docket has made clear to all litigants, that he expects pleural cases to be placed on the Inactive Docket in order to further the court's goal of reducing expenditures of court time and resources trying purely pleural actions.

There have been relatively few instances of contested placements on the active docket in Massachusetts. Indeed, while placement of pleural cases on the Inactive Docket is not mandatory, most of the primary plaintiffs' counsel involved in Massachusetts state court litigation have opted to file substantially all of their pleural cases on the Inactive Docket. As a result, the number of cases on the Active Docket and the amount of money spent on settlements with unimpaired claimants have been significantly reduced. *See Behrens & Parham, supra*, at 14.¹⁶

¹⁶ Over the lifetime of the Massachusetts asbestos litigation, plaintiffs' counsel has sought transfer to "active" status for only a small fraction of the thousands of cases on the inactive docket. The Massachusetts experience underscores how the vast majority of asbestos claimants do not have any present impairment, and will not likely develop any impairment, as a result of their asbestos exposure.

Judge Zobel recently commented that the Massachusetts inactive docket has been “really a very good system that has worked out. . . .” Columns: Asbestos, *supra*, at 3. Jim Ryan, special master of the Massachusetts asbestos litigation, has described the inactive docket as “an extremely useful tool,” saying, “I don’t see any downside for creating one anywhere else.” *Id.* at 70.

2. Chicago, Illinois

In 1991, Judge Dean Traftlet in Cook County, Illinois, established an inactive docket system for Chicago. *See In re Asbestos Cases* (Cir. Ct., Cook County, Ill. Mar. 26, 1991) (Order to Establish Registry for Certain Asbestos Matters). He did so because a “substantial number of cases” involving “plaintiffs who claim[ed] significant asbestos exposure, but who [were] not. . . physically ill” were presenting “a serious threat of calendar congestion to the Court.” *Id.* at 3. Moreover, defendants were seeing “their available resources severely strained” *Id.* Judge Traftlet believed that their resources could be better expended if the Cook County litigation “focused on those cases that involve claims of actual and current conditions of impairment.” *Id.*

3. Baltimore, Maryland

An inactive asbestos docket was introduced in Baltimore in December of 1992. *See In re Asbestos Pers. Injury and Wrongful Death Asbestos Cases*, File No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992) (Order Establishing an Inactive Docket for Asbestos Personal Injury Cases). Circuit Court Judge Richard Rombro, who oversees the asbestos litigation in Baltimore, recently remarked on the success of that court’s inactive docket plan. Since the docket’s establishment, he said, “there have been 14,713 cases filed and placed on the inactive docket; in that same period 6,098 cases have been moved to the active docket, and 71 cases which were removed to the Federal Court. The number activated from the inactive docket is over 40 percent which would indicate to

this court that the docket is working and that a substantial number of cases have been moved to the active docket while those without any impairment remain on the inactive docket.” *In re Pers. Injury and Wrongful Death Asbestos Cases*, Mem. Op. and Order Denying Modification to Inactive Docket Medical Removal Criteria, No 24-X-92-344501, at 5 (Cir. Ct. Baltimore City, Md. Aug. 15, 2002).

C. Inactive Dockets Are Gaining Momentum Around The Country

The exponential increase in asbestos claims, mostly from unimpaired claimants, recently have led several other jurisdictions – from New York City and Syracuse in New York to Seattle, Washington – to join the list of pioneering courts that have adopted inactive dockets to manage their growing asbestos caseloads.

1. New York City

In December of 2002, New York trial court Judge Helen Freedman amended the existing New York City asbestos case management order to establish a “deferred docket” for claimants with little or no present physical impairment. *See In re New York City Asbestos Litig.*, Order Amending Prior Case Mgmt. Orders (S. Ct. N.Y. City, N.Y. Dec. 19, 2002). She had observed that fewer than ten percent of the 21,000 asbestos-related personal injury or wrongful death claims pending in New York City involve claimants with asbestos-related malignant diseases; a “small percentage” have sustained functionally impairing asbestosis.” *Id.* at 1.

2. Syracuse, New York

Judge James McCarthy of New York’s Fifth Judicial District, which includes Syracuse, amended his court’s existing case management order to establish a deferred docket in January 2003. *See In re Fifth Jud. Dist. Asbestos Litig.*, Am. to Am. Case Mgmt. Order No. 1 (N.Y. Sup. Ct. Jan. 31, 2003). He reported finding that of the more than 200 asbestos-related personal injury cases

pending before his court, “less than 5% of the claimants or decedents suffer or suffer from asbestos-related malignant diseases, and a small percentage of the remainder have sustained functionally impairing asbestosis.” *Id.* at 1.

3. Seattle, Washington

King County (Seattle) Superior Court Judge Sharon Armstrong concluded in December of 2002 that the “increasing volume of asbestos cases” had made it “necessary for the court to give priority to the cases of plaintiffs who are the most ill.” Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties, at 1 (Dec. 3, 2002). The court went on to hold that “plaintiffs who are asymptomatic, who suffer from only mild reduction in lung function, or whose reduced lung function is not attributed by competent medical opinion to asbestos-related disease shall be placed on an Inactive Status Calendar” until such time that the claimant’s “symptoms or lung functions reaches the level of significant functional impairment.” *Id.*

D. Recent Case Management Orders To Address Filings By the Non-Sick

A number of state courts have recently entered innovative case management orders that also seek to prioritize asbestos cases. These orders accomplish the same public policy and legal objectives as a formal registry.¹⁷

¹⁷ In addition, the Pennsylvania Supreme Court has held that asymptomatic pleural thickening, unaccompanied by physical impairment, is not a compensable injury that gives rise to a cause of action. *See Simmons v. Pacor, Inc.*, 674 A.2d 232, 237 (Pa. 1996) (upholding *Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. Super. Ct. 1993)). Further, the court has held that the discovery of pleural plaques or a nonmalignant, asbestos-related lung pathology “does not trigger the statute of limitations with respect to an action for a later, separately diagnosed disease of lung cancer.” *Id.* Furthermore, “because asymptomatic pleural thickening is not a sufficient physical injury, the resultant emotional distress damages are likewise not recoverable.” *Id.* at 238. The court’s decision relieves the pressure on individuals to file (Footnote continued on next page)

1. South Carolina

In April of 2002, Circuit Court Judge Larry Patterson of Greenville, South Carolina, was appointed by the Chief Justice of the South Carolina Supreme Court to coordinate and control all asbestos-related cases filed in the South Carolina Circuit Courts. Pursuant to that authority, Judge Patterson issued a case management order in late 2002 governing all asbestos-related cases filed by the Wallace & Graham law firm based in Salisbury, North Carolina. *See In re Wallace & Graham Asbestos-Related Cases*, Case Mgmt. Order (Greenville County, SC 2002). The order dismisses without prejudice all Wallace & Graham asbestos-related claims except those filed by persons who suffer from malignant diseases, have functionally impairing asbestosis, or have died as a result of an asbestos-related disease. *See id.* at 4. The statute of limitations for dismissed claims is tolled. *See id.* Claimants later meeting the minimum medical criteria set forth in the order are able to refile their claims at that time. *See id.* at 5.

2. Portland, Oregon

Multnomah County (Portland), Oregon Circuit Court Judge John Wittmayer currently is circulating a draft order that would “abate” claims filed by unimpaired asbestos claimants “while preserving for the litigants their positions on any statutes of limitations issues.” *In re All Asbestos Exposure Cases Filed in Multnomah County*, First Amended Draft Gen. Order Re: Asymptomatic,

unripe claims simply to avoid statute of limitations issues later on. The court’s ruling also helps preserve assets for the seriously ill by ensuring that they will not have to compete with the unimpaired to obtain compensation. For other cases holding that pleural thickening, unaccompanied by physical impairment, does not constitute a compensable injury, see *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. 1987); *Owens-Illinois v. Armstrong*, 591 A.2d 544, 560-61 (Md. Ct. App. 1991), *appealed on other grounds*, 604 A.2d 47 (Md. 1992); *In re Haw. Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (applying Hawaii law).

Untreated, or Inchoate Disease Cases, No. 0003-0000B, at 5 (Cir. Ct. Multnomah County, OR 2002).

3. Cleveland, Ohio

The Court of Common Pleas of Cuyahoga County, Ohio, has established a filtering mechanism to screen out claims by persons who are not truly sick. According to the court's case management order, all upcoming discovery and trial preparation in the Cleveland area asbestos litigation will focus on groups of plaintiffs whose claims seek redress for functional impairment due to asbestos exposure. *See In re Cuyahoga County Asbestos Cases*, Gen. Pers. Injury Asbestos Case Mgmt. Order No. 1 (as amended Jan. 4, 2002). The court's order reflects the intent to allow the claims of plaintiffs who are functionally impaired to be decided before the claims of the unimpaired, thus helping to preserve assets needed to compensate the truly sick.

E. Innovations Used By Federal Courts to Give Priority to the Truly Sick

The different types of inactive docketing used in these jurisdictions, as with the one proposed to this Court, are consistent with federal judicial public policy. Orders to prioritize the treatment of asbestos claims have been issued by Senior U.S. District Judge Charles Weiner and U.S. District Court Judge Alfred Wolin, who oversees the USG Corporation ("USG") bankruptcy proceeding in Delaware.¹⁸

¹⁸ In July of 1991, the Judicial Panel on Multidistrict Litigation ordered all federal asbestos personal injury and wrongful death actions to be centralized before Judge Weiner. *See In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875 (J.P.M.L. 1991). At the time of the transfer, inactive dockets existed in about a dozen federal districts, including some districts with "very large asbestos caseloads." Schuck, *supra*, at 568. These included a broad and diverse number of courts, ranging from the Northern District of California, the North District of Illinois, the Northern and Southern Districts of Mississippi, the Western District of New York, the Northern District of Ohio, to the Districts of Colorado, Connecticut, Hawaii, Maine, Maryland, Massachusetts, and New Hampshire. *See id.* at 568 n.109.

1. The Federal MDL Panel

In 1992, Judge Weiner adopted procedures, which although not technically an inactive docket, had the purpose of prioritizing “malignancy, death and total disability cases where the substantial contributing cause is an asbestos-related disease or injury.” *In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Admin. Order No. 3, at 1 (E.D. Pa. Sept. 8, 1992) [hereinafter MDL 875, Admin. Order No. 3]. Under the court’s order, a select number of cases were identified and placed into one of four disease categories. *See id.* at 1.¹⁹ In each case, plaintiff’s counsel was required to have a written medical opinion by a board-certified specialist indicating that exposure to either asbestos or products containing asbestos was a contributing cause to the claimant’s condition. Cases in which the claimant suffered from mesothelioma or lung cancer were thereafter given priority with respect to review, settlement, or further litigation. Through utilization of the ordering device, thousands of cases involving non-impaired claimants were dismissed without prejudice. *See In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Order (E.D. Pa. Oct. 16, 1997) (dismissing approximately 3,200 non-impairment claims without prejudice with all applicable statutes of limitation tolled).²⁰

¹⁹ The disease categories were: (1) mesothelioma, living and deceased; (2) lung cancer, living and deceased; (3) other malignancies, living and deceased; and (4) asbestosis, total disability deceased or total disability living. *See* MDL 875, Admin. Order No. 3, at 1.

²⁰ Similarly, with respect to claims brought under the federal Jones Act for asbestos exposures during World War II and thereafter, by a May 1996 Memorandum and Order, Judge Weiner administratively dismissed without prejudice approximately 20,000 cases filed by the Jaques Admiralty Law Firm in Detroit, Michigan. Those orders provided that reinstatement of the claims in the MDL would be warranted only if each plaintiff provided the court with, among other things, sufficient medical evidence of a present “manifest injury” (rather than asymptomatic conditions such as pleural thickening or scarring). *See In re Asbestos Prod. Liab. Litig. (No. VI)*, MDL 875, Civil Action No. 2 (Maritime Actions), Order at 9, 13, 15 (E.D. Pa. May 1, 1996) (finding that with respect to the maritime cases “only a fraction of the recently diagnosed plaintiffs have an asbestos-related condition, and many of these may be

(Footnote continued on next page)

More recently, in January of 2002, Judge Weiner found that “the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs.” MDL 875, Admin. Order No. 8, *supra*. Accordingly, Judge Weiner acted to administratively dismiss without prejudice (and toll the applicable statutes of limitations of) all asbestos cases initiated through mass screenings. Cases subject to administrative dismissal remain active for the purposes of settlement, and motions to amend pleadings. Any party may request a case to be transferred to active status by filing a request for reinstatement and providing the court with an affidavit supporting the reasons for reinstatement. *See id.*

2. United States Bankruptcy Court for the District of Delaware

USG and its major domestic subsidiaries filed petitions for reorganization under Chapter 11 of the U.S. Bankruptcy Code in July of 2001. The case was assigned to U.S. District Judge Alfred Wolin.²¹ In response to USG’s request to establish procedures to resolve the asbestos personal injury liability in its bankruptcy case, Judge Wolin has ordered that claimants with legitimate

open to question. Numerous cases have either no diagnosis of an asbestos-related condition, or there is scant credible medical evidence...To file cases by the thousands and expect the Court to sort out the actionable claims is improper and a waste of the Court’s time. Other victims suffer while the Court is clogged with such filings.”). Significantly, in the seven years since Judge Weiner entered these orders, only a handful of these 20,000 maritime cases have been reinstated to active status.

²¹ Judge Wolin is a U.S. District Court Judge for the District of New Jersey in Newark. In November of 2001, the Third Circuit Court of Appeals appointed him to the U.S. Bankruptcy Court for the District of Delaware to oversee five asbestos-related bankruptcy cases, including the USG matter.

asbestos-related cancer claims shall be processed and compensated in the bankruptcy proceeding before other claimants. *See In re USG Corp., supra.*

Importantly, Judge Wolin was careful to set standards to help ensure the reliability of claims submitted. Under his order, claimants are required to provide the court with “a medical report by a board-certified internist, pulmonary specialist, oncologist, or pathologist” demonstrating a diagnosis of “a primary cancer” that was “caused by asbestos exposure.” *Id.* at 10. Each claimant must also provide additional information regarding his or her claim, including the claimant's occupational exposure to USG products and smoking history. *See id.* at 11. Upon the passing of the cancer-only bar date, or deadline, and processing of claims, the court will hold a hearing to estimate the liability of USG and its affiliates for these claims. *See id.* at 9.

F. The American Bar Association Commission on Asbestos Litigation

Finally, it is worth noting that in February 2003, the American Bar Association's (ABA) House of Delegates passed a resolution calling for Congress to adopt legislation that would defer the claims of unimpaired plaintiffs and toll all applicable statutes of limitations until such claimants are able to satisfy well-established medical criteria indicating the presence of an asbestos-related impairing condition.²² *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary,*

²² The ABA Commission interviewed several nationally recognized pulmonologists and other medical specialists with extensive knowledge of asbestos-related non-malignant conditions to determine the objective medical criteria which would constitute the threshold level of asbestos-related injury that would permit a plaintiff's case to be placed on an active docket. Based on those interviews the ABA Commission promulgated a Standard for Non-Malignant Asbestos-Related Disease Claims (the “ABA Standard”). *See Pet., Exh. G.* The ABA Standard is also based both on guidelines for diagnosing asbestos-related conditions which have been published by the American Thoracic Society (a division of the American Lung Association) and on guidelines for the evaluation of impairment published by the American Medical Association. *See The Diagnosis of Nonmalignant Diseases Related to Asbestos, Am. Thoracic Soc'y Official Statement*, 134 Am. Rev. Resp. Dis. 363-368 (Mar. 1986); Am. (Footnote continued on next page)

on the Judiciary, 107th Cong. (Mar. 5, 2003) (statement of Hon. Dennis Archer, President-elect, American Bar Ass’n). *See also* Gina Holland, *ABA Recommends Curbs on Asbestos Lawsuits*, Assoc. Press Newswire, Feb. 11, 2003. Supporters of the plan included Chicago personal injury lawyer Terrence Lavin, who said: “Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an x-ray.” Editorial, *ABA Backs Asbestos Reform*, Wash. Times, Feb. 16, 2003, at B2, *available at* 2003 WL-WATIMES 7706224 (quoting Mr. Lavin). The ABA plan, he added, “is not tort reform. It’s scandal reform.” *Id.*

While the ABA resolution was directed primarily at encouraging federal legislative action, it is yet another voice providing support for efforts to prioritize the claims of the truly ill while preserving the legal rights of the non-sick.

CONCLUSION

For these reasons, the signatories to this memorandum strongly support the Petition before this Court to Establish a Court Rule of Administrative Order Creating a Statewide Inactive Asbestos Docketing System.

1218 (1991); Am. Med. Ass’n, *Guides to the Evaluation of Permanent Impairment* (5th ed. 2001).

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